IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6587

AUG 7 1974

CLIFFORD HERRING,

Appellant,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

MOTION TO DISMISS OR AFFIRM

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CLIFFORD HERRING, Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK, Appellee.

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The Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND
THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the New York Criminal Procedure Law, Section 320.20(3) which concerns itself with non jury trial procedure and which states in part as follows:

"(c) The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first."

B. The Proceedings Below

The Appellant, after the effective date of the Criminal Procedure Law, went to trial in the Supreme Court, Richmond County, charged with attempted robbery in the first and third degrees and possession of a dangerous instrument. He waived a jury trial, choosing to be tried by the court alone. The trial was brief. The court expressly stated that "...summation is discretionary, and I choose not to hear summations." After eight minutes of deliberation the court dismissed the dangerous instrument count and convicted the appellant of attempted robbery in the third degree. On appeal the denial of summation was raised and the Appellate Division of the Supreme Court, Second Department affirmed the conviction. Leave to appeal to the Court of Appeals of the State of New York was denied. On March 22, 1974 the Appellate Division amended its remittitur to certify that a constitutional question had been ruled on when it affirmed the judgment of conviction. It specifically ruled that it considered whether the appellant's "...rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's

application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation" and determined that "...none of his constitutional rights were violated." The appellant then appealed to the Supreme Court of the United States.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

This section of the Criminal Procedure Law has not been construed in New York State. Undoubtedly there are cases in other jurisdictions in which the denial of a right to sum up constitutes reversible error. The appellant has cited a number of them. But none of these cited cases appear to have the express statutory groundwork of New York. In the cases cited there is no statute at all and there is only a so called implied right to make an argument. In New York the defendant who waives a jury trial is on notice that he may have to surrender the right of summation. Having accepted the non jury trial he takes it with all of its ramifications.

There are moreover many cases in which courts have ruled that the denial of closing argument in a non jury trial does not constitute reversible error.

In People v. Manske, 77 N E 2d 164 at 170, 399 Ill. 132 (1948) the Supreme Court of Illinois stated,

> "(12) It is also claimed that the trial court committed reversible error in declining to hear argument after the evidence was concluded. As a general rule, in a trial by the court without a jury, we are of the opinion that it is advisable in most instances for the court to listen to argument of counsel, even though it does not appear to be helpful to the court. The testimony was all taken in the presence of the trial judge; he had the opportunity to see and to hear the witnesses, and to observe the attitude and manner of testimony of the defendant. He could observe wherein he was contradicting his statements in court with those made to the officers, and could more properly judge the weight to be given the same than could we. It was perfectly natural for the defendant, after the body of the deceased was discovered, and the evidence of the bruises found upon her body, to soften as much as possible the description of the assaults, which he admits were committed. (13) We are of the opinion that the argument of counsel in this particular case would not have aided the court very much. The same point was made in People v. Berger, 288 Ill. 47, 119 N.E. 975, and there the distinction was made between arguments before a court without a jury, and it was held argument to a jury was a matter of

right, but argument before a court, alone, was largely a matter of sound discretion of the trial judge. In this particular case the court believed the evidence sufficient to convict the defendant of manslaughter, and after so announcing told his counsel he would be heard upon the question of punishment, but declined to hear any argument upon the guilt of the defendant.

We are thoroughly satisfied of the guilt of the defendant beyond a reasonable doubt, and do not believe that the defendant was prejudiced in any way by the court declining to hear argument upon the merits of the cause."

The court exercised reasonable discretion in this case in not hearing summations. The case was a simple one. Only two people were present according to the victim. The defense was alibi but the alibi witness was vague about the time he saw the appellant. And of course the alibi location was in fact close to the scene of the crime.

In West v. United States, 399 F. 2d 467, 470 (5th Cir. 1968), cert. denied 393 U. S. 1102 (1969), it was held that a non jury trial conducted pursuant to the Federal Juvenile Delinquency Act a trial court has the right to preclude a closing argument. It is clear that proceedings against juveniles receive the basic constitutional protections. The juvenile is entitled to an attorney to protect his rights and to the right of confrontation and cross examination (Kent v. United States, 383 U. S. 541). He may not be adjudged a delinquent unless the proof is beyond a reasonable doubt. (Matter of Winship, 397 U. S. 358). Confessions taken in violation of his constitutional rights may not be introduced against him. (Matter of Gault, 387 U. S. 1, 55). In short, at the same time that this Court was strengthening and clarifying the rights of juveniles concerning their vital constitutional rights, by denying certiorari in West v. United States supra, it was stating, in effect, that where the case is tried without a jury that the judge may decline to hear summations. Summations in such cases are not such a critical step in the fact finding process so that denial of summation can be said to be violation of due process.

This question of the right to summarize should be left to the sound discretion of the trial court. In many instances hearings held prior to trial concerning, for example, searches and seizures, confessions or admissions, or wire taps and their supporting orders may be of greater significance than the trial itself insofar as the final disposition of the case. But respondent is unaware of any case which holds that the denial of argument is a denial of due process.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Appellate Division of the Supreme Court of the State of New York, Second Department.

Respectfully submitted,

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